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No. 86-1861

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

PATRICK M. HYATT, HERMAN O. CAUDLE and MARY P. LOVINGOOD, on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case, previously before this Court in No. 85-474, was the subject of this Court's remand order of June 9, 1986 to the Fourth Circuit in light of *Bowen v. City of New York*, 106 S. Ct. 2022 (1986). The questions presented are:

1. Whether the Fourth Circuit erred in following this Court's instructions to apply the jurisdictional guidelines articulated in *City of New York* to the particular facts of this case.

2. Whether the Fourth Circuit erred in upholding the District Court's award of attorneys' fees premised on findings from trial evidence that Petitioner had adopted and followed a purposeful policy to disregard Fourth Circuit decisions if in conflict with Petitioner's policy rulings.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

A. *The Procedural Background of this Case.*

This case was the subject of a full trial on the merits in January 1984. App. 32a, ¶8. After receiving extensive evidence, including the testimony of

officials actually administering the Social Security Program in North Carolina, the trial court found that the Secretary of Health and Human Services was following a policy of intracircuit nonacquiescence. App. 40a-42a, 48a-49a, 54a-61a, 83a. In other words, the Secretary purposefully was refusing to follow controlling Court of Appeals' decisions construing the Social Security Act even when adjudicating claims arising in the very Circuit that had issued those decisions.[1/]

[1/] In January 1982, for example, the Secretary's Associate Commissioner for Hearings and Appeals instructed all administrative law judges to implement her policy of intracircuit nonacquiescence in this directive:

> [T]he federal courts do not run SSA's programs, and [the] ALJ's are responsible for applying the Secretary's policies and guidelines regardless of court decisions below the level of the Supreme Court.

Adjudicatory Policy Memorandum to Administrative
(continued)

The Court further found that the effect of this policy in North Carolina was systematic noncompliance with two important Fourth Circuit decisions. In *Martin v. Secretary of H.E.W.*, 492 F.2d 905 (4th Cir. 1974), the Fourth Circuit held that social security decisionmakers must consider whether hypertension or diabetes is disabling in the particular claimant's case even if it is not accompanied by end-organ damage. In *Myers v. Califano*, 611 F.2d 980 (4th Cir. 1980), the Fourth Circuit ruled that, if some cause for pain is established, decisionmakers must consider the claimant's own subjective accounts of the intensity of that pain, whether or not corroborated by "objective" or "clinical" evidence. The District Court found that decisionmakers

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Law Judges (1982), quoted in full in Joint Appendix [JA] filed with the Fourth Circuit at 353-54; *see also* JA 372-73.

in North Carolina systematically were deciding claims in violation of these holdings because they had been instructed to follow the Secretary's Social Security Rulings (in particular, SSR 82-55 and 82-58) regardless of the law of the Circuit. App. 43a-45a, 56a-57a.[2/]

[2/] The Court also found nonacquiescence in the "medical improvement" rule applicable in disability termination proceedings under *Dotson v. Schweiker*, 719 F.2d 80 (4th Cir. 1984). *See* App. 58a. Due to the intervention of Congress, this medical improvement issue and the claims of unnamed terminee class members are not before the Court. *See* Cert. Petn. 7-8. As in his petition in *Heckler v. Polaski*, *cert. denied*, No. 86-1617 (June 16, 1987), the Secretary cites this intervention of Congress to insinuate that the Court of Appeals erred in reinstating class relief on the theory that the class had become improperly represented. Cert. Petn. 6 n.3, 8 n.5. The Secretary's "arguments" in this regard, however, were not made to the Fourth Circuit on remand, were not made at any time in either lower court, and indeed are not raised by the questions presented in this petition for certiorari. Cert. Petn. (I). In any event, these suggestions of error are frivolous for reasons already explained to this Court. *See* Reply Br. in No. 85-474, *Hyatt v. Heckler*, filed Dec. 16, 1985 at 3 & n.3.

Having identified these systematic violations of the Social Security Act as interpreted by the Fourth Circuit, the District Court certified a statewide class of Social Security claimants victimized by the Secretary's policy. App. 65a-71a. In doing so, the Court concluded that it had jurisdiction over the claims of all plaintiff class members under 42 U.S.C. § 405(g).[3/] The District Court ordered new hearings for these class members and also entered injunctive relief. App. 62a-64a. The Secretary appealed.

In a decision issued March 20, 1985, a Fourth Circuit panel upheld the

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3/ Section 405(g), the judicial review provision of the Social Security Act, is reproduced at App. 104a. The statute is the pertinent jurisdictional provision in cases of this kind, because federal-question jurisdiction normally is unavailable in Social Security cases. *See, e.g., Heckler v. Ringer*, 104 S. Ct. 2013 (1984).

District Court's award of class-wide relief, including the award of new hearings to initial-applicant members of both the "Martin" and "Myers" subclasses. App. 26a-27a. In doing so, the Court observed that the plaintiff class "included claimants whose benefits were terminated because the Secretary did not follow this circuit's precedent," *id.* at 19a, and chastened the Secretary for his policy of nonacquiescence, *id.* at 20a-21a, 27a.

Based on earlier interpretations of section 405(g) in *Heckler v. Ringer*, 104 S. Ct. 2013 (1984), and *Hunt v. Schweiker*, 685 F.2d 121 (4th Cir. 1982), however, the Court of Appeals reduced the size of the plaintiff class. In particular, the Court of Appeals held that the District Court erred in assuming jurisdiction over those class members who had not fully exhausted administrative remedies. The

Court reached this conclusion because it read *Ringer* as requiring exhaustion whenever a plaintiff asserts "a claim that the Secretary was applying an improper standard for entitlement." App. 22-23a. The Court of Appeals also held that the District Court erred in including in the class persons who did not seek judicial review (or have this case pursued on their behalf) within 60 days after denial of their administrative claims. The Court considered itself bound by *Hunt* to reach this conclusion, noting that "[i]n this circuit, the 60-day requirement is considered to be jurisdictional" and therefore not subject to equitable tolling. App. 23a. Finally, the Court of Appeals vacated the District Court's award of injunctive relief based on its reading of the Social Security Disability Benefits Reform Act of 1984 (the "1984 Act"). App. 21a.

Following issuance of the Fourth Circuit's decision, the plaintiffs petitioned this Court for a writ of certiorari on the exhaustion, 60-day and injunction issues. This Court responded by holding in abeyance a ruling on the plaintiffs' petition pending its decision in *Bowen v. City of New York*, 106 S. Ct. 2022 (1986).

B. *The Decision in City of New York.*

City of New York brought before this Court precisely the same jurisdictional arguments of the Secretary that the Fourth Circuit had accepted in reducing the scope of the plaintiff class in this case. In *City of New York*, the plaintiffs had proven that, contrary to published regulations, the Secretary was concluding routinely that mentally impaired claimants were not disabled if they did not have one of the "listed impairments" set forth in the regulations. *See id.* at

2026-27 and n.5.[4/] The District Court held that the Secretary's unpublished policy was unlawful and ordered new benefit hearings for a class of claimants

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[4/] Under the regulations, the Secretary uses a five-step sequential evaluation process in disability cases. The first two steps focus on whether the applicant is actively working (if so, benefits are denied), and whether he or she suffers from some condition sufficient to be at least potentially determined to be disabling (if not, benefits are denied). The third step concerns whether the claimant has one of the "listed impairments" the Secretary views as conclusively establishing disability (if so, benefits are granted). If the claimant does not have a listed impairment, then the regulations require the decisionmaker to go on to determine whether the claimant is nonetheless unable to perform his former job (Step 4) or another job (Step 5) in light of his or her "residual functional capacity." *See generally* 106 S. Ct. at 2025. In *City of New York*, the plaintiffs proved that the Secretary was routinely determining--pursuant to a "presumption" that was "effectively conclusive," *City of New York v. Heckler*, 578 F. Supp. 1109, 1115 (1984)--that a claimant was not disabled if the claimant did not have a listed impairment, regardless of the claimant's residual functional capacity. This case, like *City of New York*, involves "effectively conclusive" presumptions with respect to hypertension and diabetes unaccompanied by end-organ damage and with respect to pain unaccompanied by objective evidence of its severity.

adversely affected by that unlawful policy. *City of New York* v. *Heckler*, 578 F. Supp. 1109, 1125. That class included persons who had not exhausted administrative remedies or strictly satisfied the 60-day time limit set forth in 42 U.S.C. § 405(g). 578 F. Supp. 1109. After the Second Circuit affirmed, 742 F.2d 729 (1984), this Court granted the writ of certiorari to consider the proper application of the exhaustion and 60-day rules.

On June 2, 1986, this Court issued its decision in *Bowen* v. *City of New York*, 106 S. Ct. 2022 (1986), and in a 9-0 ruling, rejected both of the Fourth Circuit's holdings that had led to its contraction of the plaintiff class in this case. In particular, this Court held: (1) that exhaustion of the Secretary's administrative procedures properly may be excused even when plaintiffs

challenge the Secretary's application of standards of entitlement, *id.* at 2031-33; *see* note 4 *supra*, and (2) that the 60-day time period of section 405(g) is not jurisdictional and is subject to equitable tolling, 106 S. Ct. at 2029-31. Based on these rulings, this Court--again by unanimous vote--affirmed in full the lower court's award of new hearings to all class members, including claimants who had not exhausted administrative remedies or brought suit within 60 days after the denial of their claims. *Id.* at 2033. One week later, this Court granted the petition for certiorari in this case, vacated the Fourth Circuit's March 1985 judgment, and remanded for reconsideration in light of *City of New York*.

Meanwhile, during the pendency of the plaintiffs' petition for certiorari in this Court, the District Court had

entered its second order awarding attorneys' fees to plaintiffs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (the "EAJA"). App. 92a-103a. The Secretary separately appealed that decision to the Fourth Circuit. On December 5, 1986, the Court of Appeals issued its decision addressing this Court's remand order and the attorneys' fees appeal. App. 1a-13a. It is this decision that the Secretary challenges by way of the petition now before the Court.

C. *The Fourth Circuit's Decision on Remand.*

In the decision now under review, the Court of Appeals reinstated as class members those claimants who, as in *City of New York*, had not exhausted administrative remedies or filed suit within 60 days after the final denial of their claims. In reaching this decision, the Court relied with emphasis on the policy

of intracircuit nonacquiescence established during the trial of this action. As explained by the Court of Appeals:

> On the basis of ample evidence the district court found that the Secretary instructed the North Carolina disability determination service and administrative law judges to follow the Secretary's regulations *instead of* circuit court decisions which conflict with the Secretary's interpretation of the Social Security Act. Also, the Secretary directed administrative law judges *not to cite* conflicting court decisions. 579 F. Supp. at 993-996. The Secretary's policy of nonacquiescence in the law of the circuit is well documented, and it has been the subject of congressional criticism. *See Hyatt v. Heckler*, 757 F.2d at 1459-60; H.R.Rep. 1039, 98th Cong., 2d Sess. 36-38, reprinted in 1984 U.S. Code Cong. & Admin. News 3038, 3096. The district court found, citing examples, that the Social Security Administration had applied the policy of nonacquiescence to members of several subclasses by failing to apply the law of the circuit in evaluating diabetes, hypertension, and pain.

App. 4a-5a (emphasis added). Again focusing on the trial evidence, the Fourth Circuit emphasized that these

"findings of historical fact are not clearly erroneous." App. 7a.

Confronted with this record, the Court of Appeals held that judicial relaxation of the exhaustion rule was "consistent with the analysis of the issue in *Bowen v. City of New York*." App. 7a. The Court reasoned that, "as in *City of New York*, the claim is collateral to the claim for benefits" and "claimants would be irreparably harmed if exhaustion requirements were enforced." App. 6a. The Court noted in particular this Court's observation in *City of New York* that "'[w]e should be especially sensitive to this kind of harm where the government seeks to require claimants to exhaust administrative remedies merely to enable them to receive the procedure they should have been afforded in the first place.'" App. 6a-7a, *quoting* 106 S. Ct. at 2032.

The Court of Appeals also found equitable tolling of the 60-day requirement to be proper. Again, the Fourth Circuit relied squarely on this Court's tolling analysis in *City of New York*, echoing in particular this Court's observation that these claimants "'were entitled to believe that their Government's determination of ineligibility was the considered judgment of an agency faithfully executing the laws of the United States.'" App. 7a, *quoting* 106 S. Ct. at 2030.

The Court of Appeals emphasized that its holdings with respect to the exhaustion and 60-day rules were narrow ones specifically based on the "exceptional circumstances" established by this record. App. 3a. Carefully tracking the principles laid down in *City of New York*, the Court explained that "waiver would not be available if a claimant alleges

mere deviation from applicable regulations," App. 3a, or "mere irregularities or errors," App. 8a. Relaxation of the normal section 405(g) rules was warranted only because the claimants in this case were the victims of "a systematic, unpublished policy that denied benefits in disregard of the law." App. 8a-9a.

Turning to the attorneys' fee question, the Court of Appeals affirmed the order of the District Court. The Court upheld in particular the District Court's finding that the Secretary was not "substantially justified" in "consciously and willfully disregard[ing] the law." App. 83a. The Court of Appeals could "perceive no factual or legal ground for departing" from the rule subjecting the Secretary to EAJA liability in cases of demonstrated intracircuit nonacquiescence. App. 11a-12a.

D. *The Polaski case.*

Approximately one month prior to the Fourth's Circuit's issuance of its decision in this case, the Eighth Circuit handed down its decision in *Polaski v. Heckler*, 804 F.2d 456 (1986). The *Polaski* case -- like this case -- involved a challenge to the Secretary's practice of evaluating pain in violation of governing circuit court law. That case -- like this case -- had been remanded by this Court for reconsideration in light of *City of New York*. In that case -- as in this case -- the Court of Appeals on remand held that *City of New York* called for a relaxation of strict application of section 405(g). On April 8, 1987, the Secretary filed a petition for certiorari seeking review of the Eighth Circuit's decision on remand in *Polaski*. In his subsequent petition in this case, the Secretary recommended that this case be

held in light of *Polaski*. On June 16, 1987, this Court denied the Secretary's petition in *Polaski* without comment or dissent.

DISCUSSION

This case is not a proper case for allowance of the writ of certiorari. Indeed, all the factors normally considered by this Court in making certiorari determinations indicate that this petition should be denied.

In its unanimous *City of New York* opinion, handed down just last term, this Court thoroughly explored the principles governing judicial relaxation of section 405(g)'s exhaustion and 60-day rules. This Court then acted in this very case, and the Court of Appeals on remand carefully adhered to this Court's instructions. In the decision below, the Fourth Circuit applied the plain rules set forth

in *City of New York* to the particular facts presented by this record. Indeed, the Court of Appeals itself declared its holding to be fact-specific and narrow, emphasizing that "waiver of the exhaustion requirement and tolling of the period of limitation will *rarely* be appropriate." App. 3a (emphasis added).

The Secretary can point to no decision by any other Court of Appeals--or indeed by any other court at all--with which the Fourth Circuit's decision conflicts. In fact, the development of a conflict is not even a future possibility, since the Secretary's previous policy of wholesale nonacquiescence, on which the Fourth Circuit's decision squarely rests, recently has undergone a major revision. *See* Cert. Petn. 17 n.9. Also during the course of this litigation, the Secretary has rescinded altogether one of the Social Security

Rulings his decisionmakers had applied in derogation of circuit court law, *see* Cert. Petn. 5 (discussing SSR 82-55), and has in practical effect significantly revised the other, *see* pages 36-38 *infra*. In light of these developments, the questions presented by this petition cannot and will not recur.

The decision of the Court of Appeals was made by an experienced panel of judges having extraordinary familiarity with this case.[5/] The panel's decision was unanimous, and the government's peti-

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5/ All Fourth Circuit proceedings have been before Judges Russell, Butzner and Hall. This same panel thus has considered no less than four full sets of briefs over the past three years, (*i.e.*, briefs on the initial merits appeal, briefs on the initial attorneys' fee appeal, supplemental briefs ordered by the Fourth Circuit following passage of the 1984 Act, and the extensive briefs filed following this Court's remand on June 9, 1986), three petitions for rehearing and numerous motions filed by the litigants. In addition, Judge Butzner, who wrote both panel opinions, also wrote the Fourth Circuit's decision in *Myers*.

tion for rehearing was denied without objection or comment. The result in the panel's initial decision and its studied application of *City of New York* on remand show that the lower court's approach to section 405(g) has been marked by caution and restraint.

This Court's denial, only a few days ago, of the Secretary's companion petition for certiorari in *Bowen v. Polaski, cert. denied,* No. 86-1617, clearly confirms that the petition in this case should be denied. The Secretary himself has acknowledged that "the issues in this case are closely related to those presented in *Bowen v. Polaski* because both cases involved "the Secretary's policies under SSR 82-58 regarding the evaluation of pain." Cert. Petn. at 14. In fact, the Secretary made precisely the same arguments for Supreme Court review in both petitions, with the notable excep-

tion that in *Polaski* the Secretary could advance a far *stronger* claim of possible error. *See* discussion at 25-26, *infra*. It is not surprising, in this setting, that the Secretary himself recommended that "the Court hold the petition in this case and *dispose of it as appropriate in light of the disposition in Polaski*." *Heckler v. Polaski*, No. 86-1617, Petition for Certiorai at 15 (emphasis added). Indeed, it would be fundamentally inequitable to impose further delay on these North Carolina claimants while identically situated claimants in the Eighth Circuit now proceed to receive prompt reconsideration of their claims.

The Secretary understandably wishes that this Court had decided *City of New York* differently. But, as in *Polaski*, that preference does not provide a persuasive reason for granting the writ of certiorari in this case. Nor has the

Secretary identified any other sound reason for further Supreme Court review.

Boiled down to basics, the Secretary's petition advances three arguments for allowance of the writ. First, as in *Polaski*, the Secretary argues that the Court of Appeals erred. Second, as in *Polaski*, the Secretary points to the burden he now confronts in administering the relief ordered by the lower courts. Third, the Secretary relies on *Polaski* itself in arguing that this Court should revisit section 405(g). As this Court's disposition of the *Polaski* petition indicates, none of these arguments provides a legitimate basis for intervention by this Court.

(1) The Secretary devotes most of his petition to arguing that the Fourth Circuit's decision is wrong. The Secretary's scattershot claims of error, however, are neither well-taken nor

deserving of plenary review by this Court.

(a) The Secretary initially contends that "the district court had no jurisdiction over these class members' claims" because "each such claimant declined to seek further review" after receiving "a personal notice informing him that his claim for benefits had been denied." Cert. Petn. 13-14. This argument, however, is not an argument at all, for it begs the very question presented; indeed, this Court unanimously rejected exactly the same argument in *City of New York*.

(b) Making an effort to distinguish *City of New York*, the Secretary contends that his policy of intracircuit nonacquiescence provides no justification for relaxing the exhaustion and 60-day rules. Cert. Petn. 15-17. The Secretary argues, for example, that intracircuit

nonacquiescence is merely one permissible manifestation of the rule exempting the federal government from the doctrine of nonmutual collateral estoppel. *See United States v. Mendoza*, 464 U.S. 154 (1984). The wholesale refusal by subordinate agency decisionmakers to follow controlling circuit court law, however, is a far cry from authorizing relitigation in court of particular issues earlier resolved against the government in different district or circuit courts.[6/] Nor can

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[6/] The Secretary's current reliance on *Mendoza* is also improper because the Secretary specifically abandoned her defense of the legality of nonacquiescence when the case first came before the Court of Appeals, and because the argument confuses the legality of nonacquiescence with whether or not sufficiently compelling equities exist to relax the usual limitations of § 405(g). In any event, the courts overwhelmingly have found impermissible the sort of intracircuit nonacquiescence at issue in this case. *Lopez v. Heckler*, 725 F.2d 1489, 1494, 1497 (9th Cir. 1984), *vacated and remanded on other grounds*, 469 U.S. 1082 (1984); *Valdez v. Schweiker*, 575 F. Supp. 1203 (D. Colo. 1983); *Rivera v. Heckler*, 568 F. Supp. 235 (D. N.J. 1983); *Siedlecki v.* (continued)

the Secretary persuasively contend that his flouting of the law should be ignored because "the Secretary in this case did not *formally announce* that SSA would not follow a particular decision." Cert. Petn. 16 (emphasis added). Indeed, a *sub rosa* policy of intracircuit nonacquiescence is even more pernicious than a policy that is openly disclosed. *Accord, e.g.*, C. Fallon, *Social Security & Legal Precedent*, Case & Comment, Vol. 89, No. 2 at 4 (1984).

The Secretary also grasps at straws in citing what the Court "appeared to

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Schweiker, 563 F. Supp. 43, 48 (W.D. Wash. 1983); *See ITT World Communications, Inc. v. FCC*, 635 F.2d 32, 43 (2d Cir. 1980); *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir.), *cert. denied*, 499 U.S. 975 (1980); *Jones & Laughlin Steel Corp. v. Marshall*, 636 F.2d 32, 33 (3rd Cir. 1980); *Allegheny General Hospital v. NLRB*, 608 F.2d 965, 970 (3rd Cir. 1979); *Beverly-Enters. v. NLRB*, 727 F.2d 591, 593 (6th Cir. 1984) (per curiam); *Mary Thompson Hospital, Inc. v. NLRB*, 621 F.2d 858, 864 (7th Cir. 1980); *Flores v. HEW*, 228 F. Supp. 877, 878 (D.P.R. 1964).

see," Cert. Petn. 16, in considering the emergency stay motions presented in *Heckler v. Lopez*, 463 U.S. 1328 (Rehnquist, J., acting as Circuit Justice); 464 U.S. 879 (denying motion to vacate stay of Circuit Justice). *See generally Rosenberg v. United States*, 346 U.S. 273, 286-87 (1953) (requiring substantial deference to stay issued by Circuit Justice). In fact, in *Lopez*, a unanimous Court ultimately *refused* to stay the Ninth Circuit's award of new hearings for nonacquiescence victims even though they had failed to exhaust administrative remedies. 466 U.S. 955 (1984), *reviewing stay of judgment after affirmance at* 725 F.2d 1489 (9th Cir. 1984). Although the Court did stay relief to class members who had not satisfied the 60-day requirement, it did so only to permit full exploration of the then-disputed issue whether the 60-day rule is jurisdictional. This Court, of course,

subsequently considered this very issue in *City of New York* and unanimously *rejected* the Secretary's position.

The Secretary's established policy of intracircuit nonacquiescence in fact makes this case an even stronger case than *City of New York* for relaxing section 405(g)'s exhaustion and 60-day rules. It makes no sense to require exhaustion in intracircuit nonacquiescence cases, for the very act of requiring exhaustion will provide the vehicle permitting agency decisionmakers to engage in the challenged practice of flouting circuit court law. Strict enforcement of the 60-day rule is also inappropriate in this context, because the judiciary should not be compelled to enforce a nonjurisdictional procedural rule to shield from judicial correction the Secretary's purposeful disregard of judicial authority. As the Ninth Circuit

observed in *Lopez*, the Secretary may not properly "[use] the procedural requirements as a mechanism for evading the law she is required to apply." *Lopez v. Heckler*, 725 F.2d 1489, 1506 (9th Cir.), *vacated and remanded on other grounds*, 469 U.S. 1082 (1984). The Secretary's proven practice of intracircuit nonacquiescence makes this case, if any case, an appropriate one in which to dispense with strict application of section 405(g).

(c) The Secretary also seeks to avoid *City of New York* by arguing that the informal nonacquiescence found to exist in this case was not so "'secret'" that "class members were lulled into inaction." Cert. Petn 17. The Fourth Circuit, however, persuasively responded to the Secretary's argument, concluding that considerations of "secrecy" in fact likened this case to *City of New York*. As

stated by the Court of Appeals after remand from this Court:

> We cannot accept the Secretary's argument. The Secretary never published the agency's informal policy of not following the law of the circuit with respect to hypertension, diabetes, and pain. On the contrary, as the district court found, the Secretary directed administrative law judges not to cite the conflicting court decisions. *See* 579 F. Supp. at 996. The effect of the unpublished nonacquiescence policy on North Carolina claimants was not disclosed until this case was tried. *See* 579 F. Supp 993-94.
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> The evidence did not reveal mere irregularities or errors in individual cases. Instead, it depicted a systematic, unpublished policy that denied benefits in disregard of the law. It is unrealistic to believe that publication of both the agency's regulations and the court of appeals' decisions would alert lay persons to the Secretary's nonacquiescence in circuit law. The Hyatt claimants, no less than those in *Bowen v. City of New York*, were entitled to believe that agencies charged with evaluating claims according to law had faithfully performed their duties.

App. 8a-9a.

The Secretary's arguments respecting section 405(g) in effect reflect an effort to confine *City of New York* to its own facts. This Court itself, however, observed in *City of New York* that the facts of that case fell "well within" the "outer bounds of our holding." 106 S. Ct. at 2033. The Fourth Circuit's treatment of section 405(g) was careful, accurate, and strictly in keeping with this Court's analysis in *City of New York*. As in *Polaski*, that fact-bound analysis clearly provides no basis for further review by this Court.

(d) Finally, the Secretary challenges the Fourth Circuit's decision by arguing that he violated no one's rights at all; the reinstated class members, he says, should not receive relief because *no* class members ever should have prevailed. Cert. Petn. 11 n.7, 14, 16. This challenge to the lower courts'

underlying findings of liability--which has nothing at all to do with section 405(g)--comes too late.[7] In any event, the Secretary's liability arguments have no merit.

The Secretary advances two separate liability arguments. First, the Secretary argues that his policies "were not inconsistent with the Fourth

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[7] The Secretary chose not to cross-petition for certiorari on the liability question when this case was last before the Court, so that the petition this Court granted presented questions concerning only *jurisdiction* over claims of class members who had not complied with the exhaustion or 60-day rules and the availability of *injunctive relief* in this kind of case. *See* Cert. Petn. No. 85-474 at (i) and Brief for the Respondent in No. 85-474 at (I) (identifying questions presented). Accordingly, this Court's remand order could at most return *these issues* to the Circuit Court for reconsideration. *See* S. Ct. Rule 21.1(a) (last sentence). Indeed the Secretary argued on remand, and the Fourth Circuit agreed, that this Court's remand order did not put back before the Fourth Circuit even the injunction question that *had been* presented in the plaintiffs' granted petition for certiorari, App. 9a; *a fortiori*, it was not and is not open to the Secretary to reargue the underlying issue of liability in this case.

Circuit's decisions in *Martin* and *Myers*." Cert. Petn. 16. The District Court, however, both found noncompliance with *Martin* and *Myers* in actual practice and pervasively demonstrated the facial inconsistency between the Secretary's Social Security Rulings and the holdings of these Fourth Circuit cases. App. 43a, 56a-57a. The Secretary's claim of compliance with *Martin* and *Myers* has a particularly hollow ring in the posture this case now occupies. The Fourth Circuit itself already twice has rejected the same claims of compliance with Fourth Circuit law the Secretary again makes in this petition.

In his second liability argument, the Secretary contends that Congress "ratified" the Secretary's "policies" in enacting the 1984 Act. It follows, the Secretary argues, that his policies were always "valid"; thus the lower courts

must have erred in granting relief based on their implementation. Cert. Petn. 14. The most apparent fallacy in this argument is that Congress in 1984 could not and did not change pre-existing law. That law, in the Fourth Circuit, was the Social Security Act as interpreted in *Martin* and *Myers*. There is nothing whatsoever in the 1984 Act purporting retroactively to alter these decisions or the principles they state. *See* 1984 Act § 3(a)(2), Social Security Disability Benefits Reform Act of 1984, § 3(a)(2), 42 U.S.C.A. § 1382c (West Supp. 1987), (making statutory pain standard applicable through future date so as to give Congress time for further study); *id.* at § 4(c), *id.* at 4[illegible] (making new section 4 applicable more than "30 days after enactment of this Act").

In any event, the Secretary reads far too much into the 1984 Act when he

argues that the Act "ratified" even prospectively the "administrative standards" found unlawful by the lower courts. Cert. Petn. 14. With respect to hypertension and diabetes, the Secretary argues that Section 4 of the 1984 Act implicitly endorsed the Secretary's use of a "severe impairment" test in the five-step sequential evaluation process. *See Bowen v. Yuckert*, No. 85-1409 (U.S. June 8, 1987); *see generally* note 4, *supra*. *Martin*, however, did not question at all the propriety of using a "severe impairment" test; rather, *Martin* merely rejected the Secretary's position that end-organ damage is an exclusive precondition to the establishment of disability from hypertension or diabetes. *See Yuckert*, *supra*, slip op. at 15 n.12 (Court notes that "we have no occasion to consider whether [the severe impairment regula-

tion] is valid *as applied*;" emphasis added).

Faced with this fact, the Secretary implies that Congress "ratified" even the Secretary's treatment of hypertension and diabetes because a Senate and Conference Report noted that the Secretary's severity policy was "elaborated [upon] in rulings." Cert. Petn. 9 n.6. The suggestion that this uninformative tidbit of legislative history somehow was intended to repudiate the specific holding of *Martin* simply is not persuasive. *See also Yuckert, supra*, slip op. at 13 n.9 and 15 n.12 (noting that House Report accompanying 1984 Act "urged the Secretary to reevaluate the severity criteria to determine whether they were too strict").

The Secretary also misinterprets the effect on this case of Congress' "ratification" of the Secretary's policy on pain. To be sure, Congress indicated an

intent to codify the Secretary's "current" policy with respect to pain in passing section 3 of the 1984 Act. H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 29 (1984). At the time Congress acted, however, the Secretary had restated his pain policy in a formal consent order filed in the *Polaski* litigation in a manner that reflected a substantial modification of the pain rule that had been applied to these class members. *Polaski v. Heckler*, 739 F.2d 1320 (8th Cir. 1984). In the *Polaski* consent order, issued six months after the trial in this case, the Secretary purported to clarify the Administration's pain policy, including by recognizing (contrary to prior agency practice) the propriety of considering purely subjective evidence of the intensity of pain. This "clarification" in the *Polaski* consent order had not been set forth in the text of SSR 82-58

and incontrovertibly was not the "policy" applied in North Carolina to these class members' claims. *See* App. 44a-45a. Because Congress "ratified" a policy that was never applied to the claims of these class members, the Secretary cannot reasonably argue that such ratification demonstrates an error in the findings in this case. For all these reasons, as in *Polaski*, the Secretary's ratification argument is neither meritorious nor deserving of this Court's review.[8/]

[8/] Nor is there any basis for the Secretary's related argument that this purported "ratification" by the 1984 Act somehow stripped the lower courts of the power to afford any remedy to the pain claimants in this case. *See* Cert. Petn. 17-18. These claimants are entitled to a remedy because the Secretary violated their rights by not reviewing their claims in accordance with governing law. The Fourth Circuit has remedied this wrong by ordering agency reconsiderations conducted in conformance with governing law. Notably, the Fourth Circuit recently interpreted section 3 of the 1984 Act, in conformance with *Myers*, to require consideration of purely subjective evidence of the intensity of pain. *See Foster v. Heckler*, 780 F.2d 1125 (4th Cir. 1986). (continued)

At bottom, the Secretary's argument about congressional "ratification" and the alleged consistency of his "policies" with *Martin* and *Myers* misses the basic point of the proof in this case. That proof showed that the Secretary's decisionmakers were *in real life* systematically misevaluating claims concerning pain, hypertension and diabetes. *See* JA 186, 187, 194-95, 292, 296-97, 300-01, 360, 362, 363-64. These violations were established by the evidence and the trial court's findings--regardless of the Secretary's current description of his current "policies" and regardless of the enactment of legislation months after the trial of this case.

As a result, under the court's remand order, these claimants should receive precisely the sort of review they initially should have received, but did not receive because of the Secretary's illegal conduct.

(2) The Secretary's protestations about facing a significant burden also do not justify Supreme Court review. This Court regularly denies petitions grounded principally on the onerousness of the judgment challenged in this Court.[9/] Moreover, as the *Polaski* case illustrates, the Secretary can claim no exemption from this practice. Indeed, the reasons behind the practice--the press of other Court business, the presumed adequacy of lower court review, the need for finality in litigation and the unique role of this tribunal as the arbiter of recurring questions of legal doctrine--press especially hard against allowance of the

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[9/] Cases involving life imprisonment, and even the death penalty, are illustrative. Numerous civil cases also come to mind. *See, e.g. Utah v. Ute Indian Tribe*, 107 S. Ct. 596 (1986); *Kosher v. Stamatis*, 106 S. Ct. 1515 (1986); *Elrod v. Suran*, 465 U.S. 1108 (1984); *Holloway v. Valley*, 464 U.S. 914 (1983).

Secretary's petition in this case. The Secretary, for example, already has had a full opportunity to litigate this case at all three levels of the federal judiciary. This Court, just last term, treated fully the general principles of section 405(g) jurisdiction that the Secretary asks this Court to revisit in this case. This judicial review proceeding--which has been pending since 1983 and involves potential relief for claimants unlawfully denied benefits as long ago as 1981--cries out with a vengeance for finality.

The government's plea of burdensomeness also comes to the Court unaccompanied by any convincing claim of equity. It was the Secretary, after all, who chose to flout controlling judicial authority in a systematic and sweeping fashion. *See, e.g.*, App. 48a at ¶¶ 68-69. Given the scope of the Secretary's wrong-

ful conduct, it is neither surprising nor unfair that the lower courts have ordered the Secretary to afford broad relief. Indeed, in *City of New York* this Court rejected the same protestations the Secretary now makes with words that continue to ring true:

> [W]e are aware that administrative inconvenience may result from our decision today. But the Secretary had the capability and the duty to prevent the illegal policy found to exist by the District Court."

106 S. Ct. at 2033.

In addition, while the administrative burden the Secretary faces may be substantial, it pales in comparison to the burden imposed on these class members. Both the Court of Appeals and the District Court have recognized the irreparable injury that these class members continue to endure. App. 6a, 47a. As explained by the District Court, the availability of benefits "means for

many of the members of plaintiffs' class the difference between existence at a bare subsistence level and the ability to pay the utility bills to keep warm in freezing temperatures, or to purchase an occasional item of clothing or piece of meat . . . . No amount of retroactive benefits can compensate for years of deprivation and anxiety--which may even ultimately result in death." App. 53a. The continuing human toll these class members face is no less deserving of this Court's attention than the administrative burden the Secretary has brought upon himself.

(3) Nor can the Secretary persuasively rely on the Eighth Circuit's decision in *Polaski* in seeking review by this Court. *See* Cert. Petn. 14. Obviously, what now is most telling about *Polaski* is that this Court unanimously *denied* the Secretary's petition for

certiorari in that case. This result was hardly surprising, for this Court has emphasized "the benefit it receives from permitting *several* courts of appeals to explore a difficult question before this Court grants *certiorari*," and "its practice of *waiting for a conflict to develop* before granting the Government's petition." *Mendoza*, *supra*, 464 U.S. at 160 (emphasis added). The lower courts' decisions in *Polaski* and this case were the very first decisions to apply *City of New York*. Those decisions conflict neither with each other nor with *any* decision of *any* other court. Well-established principles of certiorari jurisdiction thus dictated the proper disposition in *Polaski*, just as they do in this case.

Indeed, this Court's denial of the writ in *Polaski* establishes *a fortiori* that there is no basis for allowance of the writ here. This case came to the Court

of Appeals on findings made after a full trial on the merits; the Eighth Circuit in contrast, acted only on an appeal of a preliminary injunction. On remand from this Court, the Fourth Circuit carefully detailed the "exceptional circumstances" justifying a departure from the general exhaustion and 60-day rules, *see* App. 3a, 6a-9a; that Court, accordingly, is not possibly subject to criticism for being "almost casual" in its analysis. Compare *Polaski* Cert. Petn. 12 and 19.

Most significantly, however, the Eighth Circuit in *Polaski* neither found nor relied upon a policy of intracircuit nonacquiescence. Rather, as the Secretary repeatedly emphasized in his *Polaski* petition, the Eighth Circuit's decision rested on a Consent Order specifying only that "some adjudicators" had "misinterpreted" operative law. *See Polaski* Cert. Petn. 10, 11, 17, 19, 21.

The lower courts' additional finding of and focus on the Secretary's systematic nonacquiescence in this case plainly make it an even more compelling case than *Polaski* for relaxing the general rules of section 405(g). The denial of the writ in *Polaski* thus clearly indicates that the writ should be denied here.

(4) Finally, there is no sound reason to hold the attorneys' fee question presented by the Secretary's petition in light of *Pierce* v. *Underwood*, *cert. granted*, No. 86-1512 (May 18, 1987). *Underwood* is not relevant here because it involved neither intracircuit nonacquiescence nor any conduct akin to it, and the linchpin of both the District Court's findings (App. 83a, 94a) and the Fourth Circuit's reasoning with respect to attorneys' fees was the Secretary's nonacquiescence. As the Fourth Circuit flatly stated: "The primary issue, on

which the outcome of this case depended, was the Secretary's policy of nonacquiescence in the law of the circuit." (App. 11a). Accordingly, a "hold" on the "substantially justified" issue would not be appropriate.

Nor is a hold warranted on the ground that *Underwood* involves a challenge to a fee award in excess of $75 per hour. The District Court in this case adjusted counsel fees above $75 per hour only after making a specific finding of the unavailability of other qualified attorneys (as is authorized by the very terms of the statute, *see* 28 U.S.C. § 2412(d)(2)(A)), and determining that an adjustment to the rate was justified by increases in the cost of living (as is also specifically permitted by the terms of the statute, *see id.*). *See* App. 88a, 102a. *Underwood*, which involved no specific finding regarding the availabil-

ity of counsel and which does not concern the relevance of cost of living adjustments at all, simply is not pertinent in these circumstances. In any event, the fee increases involved here were modest and gave rise to only a fraction of the challenged award.[10/] To hold this petition for this reason in these circumstances would be truly to let the tail wag the dog.

CONCLUSION

Both this Court's established rules of practice and powerful considerations

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10/ The District Court increased the hourly fee award for some counsel in this case to either $83 or $95 per hour for work performed from 1983-85. App. 88a, 102a. These figures compare with an award in *Underwood* of $120 per hour for work performed in 1982. Indeed all but $2,836 of the total fee award made by the District Court in this case (*i.e.*, the amount based on increases for Fillette, Hayes and Harper above $83 per hour in the initial award, *see* App. 88a) reflects the fixing of fees at $75 or less, together with cost-of-living adjustments not even at issue in *Underwood*.

of fairness and finality dictate that the Court should deny the Secretary's petition for the writ of certiorari. Moreover, the appropriateness of this result is now especially clear in light of this Court's denial of the Secretary's companion petition in the *Polaski* case. For all the reasons set forth above, respondents respectfully request that this Court deny *en toto* the Secretary's petition in this case.

Respectfully submitted.

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